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September 25, 1998

VIA HAND DELIVERY

Magalie Salas, Secretary  
Federal Communications Commission  
1919 M Street, Room 222  
Washington, D.C. 20554

98-103  
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SEP 25 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: In the Matter of Pacific Bell Telephone Company, Pacific Bell Tariff FCC No.  
128, Pacific Bell Transmittal No. 1986

Dear Ms. Salas:

Please find enclosed for filing an original and 12 copies of Rebuttal of Pacific Bell in the above-captioned proceeding.

Please date-stamp and return the extra copy provided to the individual delivering this package.

Sincerely,

*Michael K. Kellogg*

Michael K. Kellogg

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**Before the  
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In the Matter of )

Pacific Bell Telephone Company )

Pacific Bell Tariff FCC No. 128 )

Pacific Bell Transmittal No. 1986 )

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CC Docket No. 98-103

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**REBUTTAL OF PACIFIC BELL**

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September 25, 1998

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	)	

**REBUTTAL OF PACIFIC BELL**

Pacific Bell ("Pacific") hereby responds to the oppositions and comments filed in response to Pacific's Direct Case, filed pursuant to the Common Carrier Bureau's Designation Order.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

Three issues were identified for investigation in the Designation Order. First, does the FCC have jurisdiction over ADSL service? If so, should the FCC assert that jurisdiction? And, finally, will the assertion of jurisdiction create an unacceptable risk of a "price squeeze"?

The answer to the first question is straightforward. Ample precedent demonstrates that the Commission's jurisdiction depends, not on the physical location of facilities, but instead on the end-to-end nature of the communication transmitted over the facilities. In the case of ADSL traffic sent to the Internet, the traffic in question is predominantly interstate; the FCC therefore has jurisdiction to regulate ADSL service used to provide Internet access. The Commission's prior decisions and the governing case law reflect this view.

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<sup>1</sup>Order Designating Issues for Investigation, DA 98-1772 (Com. Car. Bur. rel. Sept. 2, 1998).

Certain parties suggest that, although the Commission has jurisdiction over ADSL service, it should leave the regulation of such service to the States. However, providers who actually plan to do business by deploying advanced services -- as distinguished from those who are simply seeking to exploit the subsidy being received as reciprocal compensation for Internet traffic -- agree that the most effective way for the Commission to promote the introduction of advanced services for access to the Internet is to exercise exclusive jurisdiction over the Internet's mixed and inseparable interstate/intrastate traffic.<sup>2</sup> In the 1996 Act, Congress established as one of the Commission's primary tasks the promotion of such services. The Commission can fulfill this responsibility only by exercising its jurisdiction over advanced services used to provide access to interstate enhanced services.

Finally, the suggestion that federal tariffing of ADSL will result in a "price squeeze" is unsupported and unsupportable. So long as both state and federal regulators fulfill their respective responsibilities, no such price squeeze can occur.

Commenters raise a variety of other issues in response to the Designation Order, despite its limited scope. Pacific has already responded to many of these issues in its Reply. See Reply of Pacific Bell (filed June 26, 1998). In all events, given the limited scope of the issues identified in the Designation Order, these objections are not only without merit; they are also beside the point. Pacific does note, however, that the resolution of this jurisdictional issue is likely to clarify the reciprocal compensation obligations of LECs under section 251(b)(5) of the

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<sup>2</sup>The Commission might exercise this exclusive jurisdiction by federally tariffing ADSL only where the volume of interstate traffic exceeds a de minimis amount, by analogy with the Commission's treatment of special access services.

Act by demonstrating that traffic delivered to ISPs for transmission to the Internet is jurisdictionally interstate and in no event local.

## **ARGUMENT**

### **I. ADSL SERVICE USED TO PROVIDE ACCESS TO THE INTERNET IS AN INTERSTATE ACCESS SERVICE SUBJECT TO COMMISSION JURISDICTION**

As the Commission has recognized, the threshold issue raised by the tariff filings of Pacific -- as well as the similar filings of GTE and BellSouth -- is "whether calls to the Internet through ISPs are subject to FCC jurisdiction." Response of FCC as Amicus Curiae at 6, BellSouth Telecommunications, Inc. v. US LEC, No. 98CV170-MU (W.D.N.C. filed Aug. 27, 1998) ("FCC Amicus Brief"). As Pacific established in its Direct Case, jurisdiction over ADSL service -- as with other transmission services and technologies -- depends on the nature of the end-to-end communication transmitted. In the case of Internet traffic, there is broad agreement among ILECs, CLECs, and ISPs alike -- even among many who are hostile to Pacific's filing -- that the nature of the traffic is interstate. See, e.g., Ameritech at 4-22; Northpoint at 1-3; ACI & FirstWorld at 5-8; Bell Atlantic at 2-3; USTA at 1; AT&T at 3; Time Warner at 3-4; see also AOL at 9 ("FCC jurisdiction over DSL services is appropriate").

Only a few commenters actually argue that the FCC is without jurisdiction over ADSL service used to connect subscribers to the Internet via ISPs. Their arguments depend largely on the proposition that an end user's communication with the Internet is not a single communication at all but two separate communications. This claim is inconsistent with the Commission's prior decisions and the governing case law.

**A. The “Two-Call” Theory Is Inconsistent with Commission and Federal Court Precedent Which Holds That the Jurisdictional Nature of Traffic Must Be Determined End-to-End**

Opponents of federal jurisdiction argue that the Commission is precluded from asserting jurisdiction over ADSL service because the communication between an end user and the Internet is in reality two calls -- a call from the end user to its ISP, and the subsequent communication between the ISP and remote servers on the Internet. See, e.g., ICG at 4; Focal at 4-5; ALTS at 4. This argument must fail, because it contradicts five decades of uniform precedent which dictates that the jurisdictional nature of telecommunications traffic must be analyzed end-to-end, not segment-by-segment. See Ameritech at 5-9; Bell Atlantic at 5-7. “Every court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used.” NARUC v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984).<sup>3</sup>

ICG, Focal, and MCI WorldCom argue that this end-to-end jurisdictional analysis should not apply here because there are two services at issue: the telecommunications service provided by the ADSL provider between the end user and the ISP and the information service provided by the ISP. See ICG at 4; Focal at 5 (“The information service provided by the ISP is wholly separate from the local exchange telecommunications service provided by the [LEC].”); MCI WorldCom at 19. This argument, however, is a non-sequitur, because the Commission has

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<sup>3</sup>ALTS’ claim (at 5) that ADSL “is still a loop, and must be tariffed in the state jurisdiction,” is ipse dixit, not argument. See also CompTel at 4; Hyperion at 6. ADSL service, where used to provide access to the Internet, is an access service that is predominantly interstate; it is not a local exchange service. The fact that the interstate service may be provided over facilities that are physically intrastate is irrelevant.

consistently held that the end-to-end jurisdictional analysis applies equally in cases where a communication consists of more than one type of service.

Two cases are controlling. The first arose out of the Commission's assertion of jurisdiction over "channel service," a common carrier activity involving the leasing of transmission capacity to cable operators for the local delivery of broadcast signals. AT&T argued that the FCC lacked jurisdiction, because the provision of channel service was purely local -- "television signals selected and furnished by the CATV operator are locally distributed by the telephone company from the CATV operator's antenna site and control house to terminals at the home viewer's premises -- all within 1 community located within 1 State." Memorandum Opinion and Order, Commission Order, Dated April 6, 1966, Requiring Common Carriers To File Tariffs With Commission for Local Distribution Channels Furnished for Use in CATV Systems, 4 F.C.C.2d 257, 257, ¶ 4 (1966). The Commission rejected AT&T's argument, holding that cable service was inherently interstate in nature and that channel service was an indivisible part of this interstate service. This assertion of jurisdiction was later affirmed by the court of appeals. General Tel. Co. v. FCC, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969).

The court's analysis could just as well have been written in the context of the Internet:

The stream of communication is essentially uninterrupted and properly indivisible. To categorize [the local telephone company's] activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that is not only appropriate but essential to the efficient use of radio facilities. . . .

. . . Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication.

Id. at 400-01 (internal quotation marks omitted). Television broadcast is not a common carrier service and the local telephone company's common carrier service was physically located within a single State. But neither the Commission nor the court accepted the attempt to split the service into two: the communication was treated end-to-end. The Commission should take the same approach here.

Likewise, in the Voice Mail Preemption Order,<sup>4</sup> the Commission rejected the same argument that a few CLECs continue to put forward here, namely, that the Commission's end-to-end jurisdiction over interstate communications can be defeated by dividing the communication into a "telecommunications" segment and a purely intrastate "enhanced services" segment. See 7 FCC Rcd at 1620, ¶ 8. The Commission would have none of it. Instead, the Commission found that, "[w]hen the caller [to voice mail service] is out-of-state, there is a continuous path of communications across state lines between the caller and the voice mail service, just as there is when a traditional out-of-state long distance voice telephone call is forwarded by the local switch to another location in the state." Id. at 1620, ¶ 9. Noting the Act's broad definition of communication, the Commission found that the combination of telecommunication and enhanced service was, in the aggregate, "an interstate communication." Id. at 1620-21, ¶ 10. The same analysis applies here: the communication between the end user and the distant node on the

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<sup>4</sup>Memorandum Opinion and Order, Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 FCC Rcd 1619 (1992), aff'd, Georgia Pub. Serv. Comm'n v. FCC, 5 F.3d 1499 (11th Cir. 1993) (Table).

Internet is clearly interstate, and the FCC's jurisdiction over such end-to-end communication, including the piece between the end user and the ISP, should be beyond serious dispute.<sup>5</sup>

None of the CLECs can distinguish these cases. Instead, they cite language from FCC Orders that have nothing to do with the jurisdictional nature of Internet access for the proposition that the Commission has recognized that Internet access consists of both a telecommunications service and an information service. See, e.g., ICG at 6 (quoting Advanced Services Order ¶ 36). This determination has no bearing on whether the FCC has jurisdiction over the telecommunications service portion of that communication. Not only did the Commission reject just such an argument in the Voice Mail Preemption Order, it has explicitly rejected the related argument in the reciprocal compensation context: "the question of whether competitive LECs that serve Internet service providers . . . are entitled to reciprocal compensation . . . does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider." Report to Congress, Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 11552 n.220 (1998).

Likewise, the claim that "telecommunication" stops at the ISP, see ALTS at 4, is wrong and unsupported by any legal authority. The transmission of information to or from a distant server from or to an end user falls within the Act's broad definition of telecommunications, that

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<sup>5</sup>The Commission has indicated in its recent Notice of Proposed Rulemaking released with the Advanced Services Order that it proposes a new federal regulatory regime to encourage ILEC deployment of DSL services. See Memorandum Opinion and Order, and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147 et al., FCC 98-188, ¶¶ 85-117 (rel. Aug. 7, 1998). If the Commission lacked jurisdiction over such services, its issuance of such proposals would be pointless.

is, "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

47 U.S.C. § 153(43). That the ISP is also an information service provider does not imply that some part of the transmission is no longer "interstate telecommunication" -- to the contrary, the Act recognizes that information services are provided "via telecommunications." Id. § 153(20). The Commission has consistently rejected efforts to limit federal jurisdiction by arguing that a communication terminates at an intermediate switching point. See, e.g., Teleconnect Co. v. Bell Tel. Co., 10 FCC Rcd 1626 (1995), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (1997).

**B. The Commission's Access Charge Exemption for ISPs Supports Assertion of Federal Jurisdiction Over ADSL**

Some parties claim that assertion of federal jurisdiction over ADSL service used to access the Internet would be inconsistent with the Commission's policy, recently affirmed by the Eighth Circuit, of providing ISPs an exemption from access charges. See Focal at 5; Hyperion at 4; ALTS at 10; AOL at 11. This argument is doubly wrong: as an initial matter, the ISP's exemption from access charges supports, rather than undermines, the case for federal jurisdiction over Internet traffic. Moreover, the authorization of ADSL as an interstate access tariff will not affect the Commission's current policy of permitting ISPs to purchase existing intrastate local exchange services from state tariffs.

As Pacific established in its Direct Case, for 15 years the Commission has recognized that enhanced service providers "obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location, and,

commonly, another location in the exchange area.”<sup>6</sup> The Commission nonetheless concluded that ESPs should be exempted from access charges on policy grounds, and the Commission has reaffirmed that conclusion subsequently. See Ameritech at 10-12 (reciting history). As Ameritech points out, that policy decision necessarily rests on the determination that, without such an exemption, ESPs would be subject to access charges -- that ESP traffic is interstate access traffic when it is transmitted interstate. “[T]he Commission would not have found it necessary to exempt ESP traffic from the Part 69 access charge regime were it not interstate access traffic in the first place.” Id. at 12; see also Bell Atlantic at 7-8.

Likewise, the fact that ISPs are treated as end users for some purposes does not alter the end-to-end jurisdictional analysis to be applied to the transmission to or from the Internet. For example, in the case of a “leaky PBX,” the Commission levied interstate access charges on physically intrastate private lines between a customer’s premises and a customer’s PBX because the PBX could route an end-to-end interstate communication.<sup>7</sup> The jurisdictional nature of traffic depends on the “communication from its inception to its completion,” whether or not some facilities over which the communication travels are private lines rather than common carrier facilities. United States v. AT&T, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), aff’d sub nom. Hotel Astor v. United States, 325 U.S. 837 (1945).

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<sup>6</sup>Memorandum Opinion and Order, MTS and WATS Market Structure, 97 F.C.C.2d 682, 711-12, ¶ 78 (1983).

<sup>7</sup>ALTS’s attempt to distinguish the leaky PBX case fails for the reasons given in GTE’s Rebuttal. See GTE Rebuttal at 22 n.67.

Several parties argue that tariffing ADSL service as an access service at the federal level will undermine the access charge exemption. E.g., Hyperion at 4. This argument -- which has nothing to do with the Commission's jurisdiction over such services -- is also wrong as a policy matter. As GTE has pointed out, a federal ADSL offering "in no way constricts the continuing ability of any ISP to obtain access to the local exchange using state-tariffed business lines for end-user 'dial up' business." GTE Rebuttal at 19. Just as significant, however, the access charge exemption has been grounded on the proposition that access charges are not cost-based, and that ESPs should not have to bear the burden of above-cost access charges. Pacific's ADSL offering, by contrast, is cost-based, and requiring ISPs to purchase ADSL service from interstate tariffs will not burden those providers in the least -- indeed, with a variety of competitive advanced service offerings available, ISPs will turn to Pacific's ADSL service only to the extent that it provides the most economical vehicle for high speed access to customer premises.

**C. Pacific Bell Has Shown That Internet Traffic Is Not Severable**

A few commenters argue that, even if some Internet traffic is interstate, Pacific has failed to establish that the traffic is jurisdictionally inseparable. See, e.g., ALTS at 20; Intermedia & e.spire at 4. This argument flies in the face of the determinations of the Commission's own Office of Plans and Policy:

For an Internet connection . . . the user may have no idea where the sites he is viewing are located. One Internet "call" may connect the user to information both across the street and on the other side of the world. Furthermore, dynamic routing means that packets may take different routes across the Internet to reach the same site, so even the location of the site the user is contacting does not provide sufficient information to identify the routing of the call for jurisdictional purposes. Internet routers have also not been designed to record sufficient data about packets to support jurisdictional segregation of traffic.

Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy 45 (OPP Mar. 1997). Likewise, the Eighth Circuit noted that “[a]s the FCC argues, the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements.” Southwestern Bell Tel. Co. v. FCC, Nos. 97-2618 et al., 1998 WL 485387, at \*10 (8th Cir., Aug. 19, 1998). Thus, if any portion of Internet traffic travelling over ADSL service is interstate -- and about this there can be no serious dispute -- the FCC can, under the doctrine of inseverability, assert exclusive jurisdiction over that service. See, e.g., Voice Mail Preemption Order, 7 FCC Rcd at 1621-22, ¶¶ 13-15 (finding that interstate services were jurisdictionally inseverable from intrastate services where BellSouth was unable to “identify[] the origin of the calls to its” enhanced service).

Pacific acknowledged in its Direct Case that some conceivable applications of ADSL service might be purely intrastate, that such service would be subject to regulation by the States, and that Pacific has consequently filed an intrastate ADSL tariff as well. See Direct Case at 2. Pacific gave the example of an employee who uses ADSL for access to an in-state corporate local area network. Hyperion responds that such use might also involve interstate traffic, either because the local area network would be connected to an interstate-wide area network or because the local area network would itself be connected to the Internet. Hyperion's observation is correct, but poses no obstacle to Pacific's jurisdictional analysis. To the extent that ADSL service is used to provide interstate telecommunications -- analyzed end-to-end -- the service is interstate and the interstate access tariff would apply to such use. The Commission's “leaky PBX” decisions dictate as much.

#### **D. ADSL Is an Interstate Access Service**

Several parties argue that ADSL Service used to provide Internet access does not qualify as “exchange access” and that this provides a non-jurisdictional basis for rejecting Pacific's tariff. See Focal at 2-4; CIX at 3; ICG; RCN. Neither argument has merit.

The CLECs base their argument on the Act's definition of “exchange access,” that is, “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” 47 U.S.C. § 153(16). Assuming for the sake of argument that Internet access falls outside this definition,<sup>8</sup> such service nonetheless does qualify as another type of access identified in the Act -- “information access.” Id. § 251(g). Moreover, Internet access also falls within the definition of “access service” in the Commission's rules. Section 69.2 of those rules defines “access service” broadly to “include[] services and facilities provided for the origination or termination of any interstate or foreign telecommunication.” 47 C.F.R. § 69.2(b) (emphasis added). Because Internet communication is interstate telecommunications, access to the Internet falls within this definition.

In addition, Internet access is “exchange access” in Commission parlance. In the Advanced Services Order, the Commission noted that advanced telecommunications service, including ADSL, is either “telephone exchange service” or “exchange access.” Advanced Services Order ¶ 40. If the definition of exchange access were limited in the way that some

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<sup>8</sup>The literal and restrictive reading of this definition in fact seems implausible, because it would overrule the Commission's “leaky PBX” decisions, where access charges were imposed on the owners of private lines, even though there was no toll telephone service involved in the transmission.

opponents of federal jurisdiction suggest, the Commission would not have left open the possibility that advanced services were "exchange access" services.

Viewing ADSL service as an access service provides an additional basis for Commission jurisdiction. Because ADSL service is analogous to a private access line to the Internet, a customer's use of ADSL should be considered interstate so long as more than 10 percent of the traffic carried over the ADSL is interstate. See Decision and Order, MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660 (1989). Several participants to this proceeding have presented evidence that Internet traffic is at least 10 percent interstate, and while that assertion has been questioned by others, see, e.g., ALTS, there is simply no evidence to contradict what is, after all, a highly conservative estimate.

## **II. THE COMMISSION SHOULD EXERCISE ITS JURISDICTION OVER ADSL TO PROMOTE THE DEVELOPMENT OF ADVANCED SERVICES**

Both Congress and the Commission have recognized that consumers urgently need access to high-speed data services and other advanced telecommunications capabilities. Congress made it a primary goal of the 1996 Act "to establish a national policy framework that will accelerate rapidly the private sector deployment of new and advanced telecommunications and information technologies and services," and "to promote and encourage advanced telecommunications networks, capable of enabling users to originate and receive affordable, high-quality voice, data, image, graphics, and video telecommunications services."<sup>9</sup> Several sections in the Act -- including sections 157 and 230 -- are designed specifically to promote advanced

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<sup>9</sup>S. Rep. No. 104-23, at 17, 50 (1995) (emphasis added).

telecommunications and Internet services. Section 157 of the Act makes it “the policy of the United States to encourage the provision of new technologies and services to the public.”

47 U.S.C. § 157(a). At least 20 additional sections of the Act also are designed to encourage deployment of new technology.<sup>10</sup>

In light of this clearly expressed congressional policy in favor of deployment of advanced services for Internet access, the FCC is bound to exercise its jurisdiction over ADSL service. As Covad writes, “[i]mposition of a uniform, . . . pro-competitive Federal regulatory regime for DSL would plainly advance this important statutory objective.” Covad at 9 (CC Docket No. 98-79).<sup>11</sup> Northpoint agrees, stating that it “has no objection to a Commission decision that ADSL is an interstate service.” Northpoint at 3. See also ACI & FirstWorld at 9-11. Indeed, it would be extraordinary for the Commission to abdicate responsibility in an area that Congress itself has indicated is so central to the development of the nation's telecommunications infrastructure.

AT&T, among others, while acknowledging that the Commission has jurisdiction, urges the Commission to honor its jurisdiction in the breach -- that is, by rejecting Pacific's tariff and instead leaving the tariffing of ADSL to the several States. See AT&T at 6-8; see also AOL at 5 (“the FCC could . . . allow tariffing and regulation of such services at the state level”). Neither AT&T nor anyone else can provide any support for such a course as a matter of policy. To the

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<sup>10</sup>See, e.g., 47 U.S.C. §§ 225(d)(2), 230(b)(1) and (2), 254(b)(2), (3) and (6), (c)(1), (h)(2)(A), 257(b), 273(e)(3), 309(j)(3)(A), (B) and (C), (j)(6)(G), (j)(12)(D)(ii), (j)(13)(D), 610(b)(3), (e), 614(a)(2).

<sup>11</sup>Covad also states that the regulatory regime should be “cost-based.” Pacific's tariff is cost-based; however, Pacific also believes that the FCC should deregulate advanced services as quickly as possible. See SBC Petition for Relief.

contrary, "[s]tate regulation . . . could impede the nation-wide deployment of DSL service."

Covad at 9. While Some states may adopt pro-competitive frameworks that encourage deployment of advanced services,<sup>12</sup> the only way for the Commission to ensure that ADSL regulation promotes, rather than discourages, deployment of advanced services nationwide is for the Commission to exercise its jurisdiction over such services.

Some parties suggest that because the Commission has not interfered with state tariffing of local services used to provide access to the Internet in the past -- specifically, POTS service and ISDN service -- it should not do so now, either. But that suggestion simply restates the ESP exemption -- that is, a decision that ESPs should have access to existing local exchange services for interstate traffic. It says nothing about how the Commission should treat the regulation of new services created explicitly for the provision of access to interstate services like the Internet. That is, the claim ignores the fundamental differences between ADSL and other DSL services and the services that have come before. Both POTS and ISDN rely on the circuit-switched local exchange network to provide Internet access. In the case of ADSL, by contrast, only the copper wire plant is in common with the local exchange network, and even that loop is enhanced by electronics. ADSL data traffic never hits the switched network at all; it is split off to the packet-switched network. Congress has clearly enunciated the federal interest in promoting on a nationwide basis the deployment of advanced services. The Commission can pursue this congressional mandate effectively only by accepting responsibility for regulation of such advanced services when used to provide interstate Internet service.

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<sup>12</sup>See, e.g., Res. T-16191, California Public Utility Comm'n, Sept. 17, 1998.

### **III. THE POSSIBILITY OF A "PRICE SQUEEZE" PROVIDES NO BASIS FOR REJECTION OF PACIFIC'S TARIFF**

In its Designation Order (at ¶ 10), the Commission posed the question whether "the Commission should defer to the states the tariffing of retail DSL services in order to lessen the possibility of a price squeeze." Pacific pointed out in its Direct Case that the "price squeeze" objection provides no basis for the Commission to defer to the States the tariffing of retail DSL services for at least two reasons. First, there is no reason to doubt that any price squeeze concerns can be addressed before the appropriate regulatory body -- state or federal -- simply because the Commission exercises its pricing authority over interstate DSL services while the States retain their rightful authority over UNE pricing. Pacific further pointed out that the alleged "price squeeze" concerns exist with any interstate special or switched access service.

The Comments filed in response to the Direct Case confirm Pacific's view. The author of the "price squeeze" objection -- Northpoint -- acknowledges that the Commission has jurisdiction over Internet access and explicitly states that it has "no objection to a Commission decision that ADSL is an interstate service." Northpoint at 1, 3. As Northpoint recognizes, any concerns as to a price squeeze can be addressed without deferring tariffing of DSL services to the States. *Id.* at 5. Other commenters provide additional support for this position. *See* Ameritech, Bell Atlantic.

### **IV. THE REMAINING ISSUES RAISED IN THE COMMENTS ARE OUTSIDE THE SCOPE OF THIS PROCEEDING**

The parties raise a myriad of issues in their comments on Pacific's Direct Case, but these comments are outside the scope of the Commission's Designation Order and therefore irrelevant for the purposes of the Commission's jurisdictional inquiry. Many of these objections have already been addressed in Pacific's Reply, filed June 26, 1998.

One issue in particular appears in these comments again and again -- the question of CLECs' entitlement to reciprocal compensation for traffic originated on ILECs' networks and transmitted over CLECs' facilities to ISPs for connection to the Internet. Numerous parties -- recognizing either implicitly or explicitly that the Commission has jurisdiction over ADSL service used to provide Internet access -- plead with the Commission to make clear that its ruling would have no impact on the jurisdictional status of dial-in Internet access, nor on CLECs' entitlement to reciprocal compensation. The Commission can do no such thing.

Several commenters point hopefully to the Commission's recent court filing in North Carolina, and note that the Commission declined to seek a primary jurisdiction referral on the question of CLECs' entitlement to reciprocal compensation on the ground that resolution of the jurisdictional issue at stake in this proceeding might not resolve the question of the proper interpretation of a given interconnection agreement. See FCC Amicus Br. at 6. Whatever truth that observation may have as a general matter, it is certainly correct that, in some cases, State commissions have resolved the reciprocal compensation question by insisting that calls to the Internet are jurisdictionally local, not interstate. See, e.g., New York Public Service Comm'n at 2 ("The fact that the call may sometimes be handed off and routed within the ISP's computer network(s) or through the Internet backbone does not alter the jurisdictional nature of the call from the end user to the ISP.") (quoting its proceeding on the reciprocal compensation scheme between carriers who transport calls from end users to ISPs).

At a minimum, the Commission's determination that ADSL access to the Internet is within the Commission's jurisdiction will go a long way toward establishing that traffic delivered

to ISPs for transmission to the Internet cannot be considered local traffic for the purposes of the reciprocal compensation obligation of section 251(b)(5) of the Act.


That result will not only be the only correct legal resolution, it will also make good policy. As even some CLECs admit, payment of reciprocal compensation for delivery of traffic to ISPs is a “boondoggle.” See Communications Daily, Sept. 17, 1998, at 4 (remarks of Chuck McMinn, Chairman of Covad Communications). By subsidizing CLECs providing dial-in access to ISPs, the payment of such compensation actually discourages the deployment of high-speed networks. See id. (“Reciprocal compensation should be abolished for calls to Internet service providers because it reduces incentives for [CLECs] to upgrade to high-speed network.”). The FCC’s assertion of jurisdiction over Internet access traffic is compelled by prior Commission precedent, case law, and the “facts on the ground”; the assertion of jurisdiction will have the added benefit of promoting the deployment of advanced services by reducing the incentives for CLECs to engage in regulatory arbitrage.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in Pacific Bell's Direct Case, the Commission should approve Pacific's ADSL tariff.

Respectfully submitted,

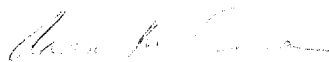
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## CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the Rebuttal of Pacific Bell to be served on the parties on the attached service list by hand delivery (as designated by \*) or by first-class mail on this 25th day of September, 1998.



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Tariff FCC No. 128, Pacific Bell Transmittal No. 1986  
CC Docket No. 98-103

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